to the surety he should have been given notice of taxation but he has not been so given and the effect of that omission in my opinion is that he is not bound by the certificate of the Assistant Registrar and that the taxed costs certified under that certificate cannot be enforced against him.

That, it appears to me is how the position now stands. There was in fact no need for this motion, and if there had been, as Mr. Sault pointed out it should have been by motion in the action and not by way of an originating motion. I would also draw attention to the fact that the originating motion is not addressed to anybody, nor is it properly intituled or expressed to be between any party.

The motion must be dismissed but I make no order as to costs. I think that the plaintiff by his failure to give the surety notice of the taxation has been responsible for causing the difficulties that have arisen.

Order accordingly.

Solicitors: *Muthu & Co.*; *W. H. Sault.*

CHOW YOONG HONG v. CHOONG FAH RUBBER MANUFACTORY

[P.C. Lord Denning, Lord Devlin and Mr. L. M. D. de Silva) December 4, 1961]

[Privy Council Appeal No. 53 of 1960]

Money and Moneylending — Two series of transactions — Post-dated cheques — Purchase of cheques at discount with post-dated cheques as collateral security — Whether money-lending transactions — Moneylenders Ordinance, 1951 — What constitutes "interest" in section 2 — Discussion on s.3.

The plaintiff was a wholesale dealer in textiles and defendants manufacturers of rubber shoes both having businesses in Kuala Lumpur. In the course of his business the plaintiff, from time to time, received outstation cheques from his customers which took several days to clear and on which he could not draw till they were cleared. The defendants had a special arrangement with their bank under which, for a special charge, they were allowed to draw on the credits of such cheques at once. Since 1954 plaintiff and defendants had worked on an understanding whereby plaintiff endorsed over to the defendants his out-station cheques and the defendants gave him their own cheque in exchange.

On February 17, 1958 the plaintiff gave to the defendants fifteen out-station cheques and defendants gave him their cheque for the total amount but post-dated February 24, 1958. Between February 21 and 28 there were seven other similar transactions. In each case the plaintiff was given a cheque post-dated by about a week. In respect of these latter transactions it was alleged by the defendants that the plaintiff had, in fact, purchased their out-station post-dated cheques, charging them interest and that they had additionally given their own cheques as collateral security.

The cheques of the defendants in the hands of the plaintiff having been dishonoured, the plaintiff brought an action for the recovery of $31,112.06 which was the total amount of the cheques.

The only defence put forward was that the transactions were money-lending transactions and that as there was no compliance with sections 15 and 16 of the Moneylenders Ordinance, 1951, in that plaintiff was not licensed as a moneylender and there was no memorandum in writing, the contracts in pursuance of which the cheques given were unenforceable.

In the High Court Ong J. gave judgment for the plaintiff.

The Court of Appeal reserved this decision and found for the defendants.

On appeal to the Privy Council by the plaintiff.

Held: (1) in respect of the first group of transactions there was no excess charged. But even assuming that an excess was charged, to prove that the transaction was a moneylending transaction the excess must fall under the definition of "interest" in section 2 of the Moneylenders Ordinance being "any amount by whatsoever name called in excess of the principal payable or paid to the moneylender in consideration of or otherwise in respect of a loan." As no loan was proved, the excess could not be interest as defined and the transaction was not therefore a moneylending transaction;

(2) in respect of the second group of transactions, even accepting the evidence of the defendants as to their nature all that was disclosed was a group of transactions amounting to purchase of bills at a discount. Such transactions are distinct from moneylending transactions and designating discount as "interest" cannot alter their nature. Similarly, the fact that a purchaser of bills is usually a bank or a discount house or that the cheques were post-dated did not affect the nature of the transactions.

Section 3 of the Moneylender's Ordinance 1951 discussed and explained.

Cases referred to:—

(1) *Olds Discount Co. Ltd.* v. *John Playfair Ltd.* [1938] 3 All E.R. 275.

(2) *Sadhu Singh* v. *Sellathurai* [1955] M.L.J. 117.

PRIVY COUNCIL APPEAL.

W. W. Stabb for the appellant.

E. F. N. Gratiaen Q.C. (Ceylon) and *J. A. Baker* for the respondents.

Cur. Adv. Vult.

The judgment of the Lords of the Judicial Committee of the Privy Council was delivered by,

Lord Devlin: This is an appeal from a judgment of the Court of Appeal at Kuala Lumpur setting aside an order of the High Court that the defendants, the present respondents, should pay the plaintiff, the present appellant, the sum of $31,112.06 in respect of dishonoured cheques drawn by the defendants and payable to the plaintiff.

The plaintiff and the defendants carry on business at Kuala Lumpur, the one as a wholesale dealer in textiles and the other as a manufacturer of rubber shoes. Their dealings together, which they have had since 1954, appear to have been financial rather than commercial and arose, perhaps, from the fact that the defendants' cashier was the plaintiff's nephew. In this action the plaintiff is suing the defendants on sixteen cheques drawn by the defendants in February and March, 1958, in favour of the plaintiff and on presentation dishonoured.

The cheques were given to the plaintiff in the course of certain transactions whose nature it is necessary to investigate and determine.

The investigation is made difficult by the fact that at the trial neither side told the truth. The trial judge found that the two chief witnesses for the defendants, their managing partner and cashier, were "entirely unworthy of credit"; he was not impressed by the demeanour of the plaintiff and on one important issue he expressly rejected his evidence. Fortunately, in regard to the first eight cheques, D.3-10, a number of essential facts was not in dispute and their Lordships will, therefore, consider first the evidence relating to the cheque D.3, the first of this group.

In the course of his business the plaintiff received from his customers a number of out-station cheques which would take several days to clear — between seven and ten according to the station from which they came; and the plaintiff could not draw on them until they were cleared. The defendants, however, had a special arrangement with their bank whereby for a special charge they were allowed to draw on the credit of such cheques at once. Accordingly, on a number of occasions in and after 1954, the plaintiff endorsed over to the defendants a quantity of his out-station cheques and the defendants gave him their own cheque in exchange. On 17th February, 1958, the plaintiff gave to the defendants fifteen out-station cheques, totalling $6,964.33 and in exchange the defendants gave him their cheque for the like amount post-dated to 24th February, 1958. This is the cheque D.3. Seven other similar transactions took place between 21st and 28th February. In each case the plaintiff got a cheque post-dated by about a week.

So far the evidence is agreed. But while the plaintiff says that the post-dating of the cheques did not matter to him since the out-station cheques in his account would have taken several days to clear, the defendants say that the plaintiff charged them interest. Whether the interest was payable in respect of the whole period of the post-dating or only for the extra days, if any, over and above the time taken for clearance when the plaintiff was actually out of his money, when and how the interest was paid and at what rate were matters which the defendants' witnesses left uncertain. In the type of transaction which characterised the second group of cheques, the defendants say that the plaintiff charged interest at the rate of 8 cents per $100 per day. But these points are not now of much importance, for the trial judge expressly rejected the whole of the defendants' evidence (which the plaintiff had denied) relating to the payment of interest.

In relation to the second group of cheques, D.11 to D.18, there was a sharp conflict of evidence. The plaintiff said that these cheques were given to him as the price of goods sold: this was the part of the plaintiff's evidence that the trial judge expressly rejected. The defendants said that these transactions also related to out-station cheques, but that this time the transfer of the cheques was the other way round. The defendants had also out-station customers who paid by cheque for goods sold to them. These cheques were usually post-dated; they appear to have been drawn before delivery of the goods. The defendants wanted to obtain immediate cash and so they got the plaintiff to discount them. The discount charged was calculated at the rate of 8 cents per $100 per day of the period between the date of the transaction and the maturity of the cheque. In any case in which the plaintiff was doubtful about the creditworthiness of the defendants' customer, he required the defendants to give, as collateral security, their own post-dated cheque maturing the same day as the customer's. The eight cheques in the second group were all of them cheques given by the defendants in fulfilment of this requirement.

These being the essential facts which emerged in evidence, their Lordships turn now to consider the defence to the claim. The onus was upon the defendants to prove that there was no consideration for the cheques for which they were sued. They sought to do this by means of an allegation that the contracts in pursuance of which the cheques were given were unenforceable. Sections 15 and 16 of the Moneylenders Ordinance, 1951, provide that no contract for the repayment of money lent shall be enforceable if it is lent by an unlicensed money-lender or if there is no memorandum in writing. It is not disputed that in the present case there was no licence and no memorandum, so that what the defendants had to prove in order to make out the defence pleaded was, first, that the contracts to which the cheques related were contracts "for the repayment of money lent", and, secondly, that the plaintiff was a money-lender within the meaning of the Ordinance.

Their Lordships will consider first the question whether the second group of contracts were contracts for the repayment of money lent; and they answer that they were not. In giving this answer their Lordships bear in mind that the plaintiff's version of these transactions was expressly rejected by the trial judge; and they have assumed that the defendants' version, which was not expressly and totally rejected by the trial judge, is the true one. The business of buying bills at a discount, that is, for their value at the date of purchase, is well known and is quite distinct from money-lending. Nowadays the buyer is usually a bank or a discount house, but the fact that he cannot be put into either of those categories does not alter the nature of the transaction, neither does the designation of the discount as interest. There is here no loan of money and no promise of repayment. Their Lordships' conclusion on this point is in accordance with the decision of Branson J. in *Olds Discount Company Ltd.* v. *John Playfair Ltd.*[1] that a purchase of book-debts for a specific sum was not a money-lending transaction.

The only feature of these transactions of the second group that makes it possible even to argue that they are money-lending transactions is the post-dated cheques given by the defendants. These are represented in the argument for the defendants as promises of repayment and the cash paid for the customers' cheques is said to be a loan. Their Lordships are satisfied that the post-dated cheques do not affect the nature of the transactions. A buyer of a bill naturally wants to have recourse to the seller of it as well as to the drawer; and in the ordinary way he will obtain this because the seller will also be an endorser of the bill. Their Lordships would suppose that when the out-station cheques were transferred to the plaintiff, they were endorsed by the drawees, that is, the defendants. If so, it is difficult to see what added advantage the plaintiff got from the post-dated cheques; and in any event they could not have done more than put the defendants in the ordinary position of endorsees. In *Olds Discount Company Ltd.* v. *John Playfair Ltd.* the seller of the book debts also gave as security bills drawn on himself and that was an added advantage to the buyer; but that did not in the judgment of Branson J. affect the nature of the transaction.

In relation to the first group of cheques Mr. Gratiaen for the defendants has advanced an argument that accepts the judge's finding that no additional payments, whether by way of interest or otherwise, were made by the defendants to the plaintiff. "Interest" is defined in section 2 of the Ordinance as including "any amount by whatsoever name called in excess of the principal payable or paid to the money-lender in consideration of or otherwise in respect of a loan". Mr. Gratiaen seeks to bring his case within these words by demonstrating that although the post-dated cheques given by the defendants in each case were nominally equal to the out-station cheques exchanged for them, the post-dated cheques were in reality of greater value and that the excess is "interest" within the meaning of the definition. The first post-dated cheque (D.3) was for $6,964.33 and this was the exact total of the out-station cheques taken in exchange. But, Mr. Gratiaen submits the cash value of the out-station cheques was $6,964.33 minus $x, -x$ representing the amount of the special charge which the defendants had to pay their bankers in order to draw on the out-station cheques; thus, he says, the post-dated cheque D.3 was worth more than the 15 out-station cheques. Their Lordships with respect regard this argument as fanciful. If the cash value of the 15 out-station cheques on 17th February is to be taken as $6,964.33 minus x, then by the same token the cash value on the 17th February of the cheque post-dated to 24th February is $6,964.33 minus $y, -y$ being the appropriate discount. Since there is no evidence in this case showing whether x was greater or less than y, it is impossible to say which is the larger sum.

Even if the post-dated cheques did produce an excess, that is not "interest" within the definition unless there is a loan. As in the case of the second group of transactions, their Lordships have looked in vain in this first group for anything that can fairly be represented as a lending of money by the plaintiff and the promise to repay. The fundamental error that underlies the defendants' case on both groups of cheques is that because they were, so they say, in need of ready cash, and because the plaintiff supplied them with it and made, if he did, a profit out of doing so, therefore there was a loan and a contract for its repayment. There are many ways of raising cash besides borrowing. One is by selling book debts and another by selling unmatured bills, in each case for less than their face value. Another might be to buy goods on credit or against a post-dated cheque and immediately sell them in the market for cash. Their Lordships are, of course, aware, as was Branson J. that transactions of this sort can easily be used as a cloak for money-lending. The task of the court in such cases is clear. It must first look at the nature of the transaction which the parties have agreed. If in form it is not a loan, it is not to the point to say that its object was to raise money for one of them or that the parties could have produced the same result more conveniently by borrowing and lending money. But if the court comes to the conclusion that the form of the transaction is only a sham and that what the parties really agreed upon was a loan which they disguised, for example, as a discounting operation, then the court will call it by its real name and act accordingly.

Mr. Gratiaen has submitted that the transactions in the second group at least were shams. Why else, he argues, did the plaintiff invent a false story about the sale of goods? In other circumstances this might be a very strong point; but it is no use to the defendants' case unless they produce evidence showing that the true nature of the transaction was that of a loan. It is impossible to do more for the defendants (and it does not appear that the trial judge was prepared to do as much) than to accept in full their version of these transactions which shows the purchase of bills at a discount and nothing more. When payment is made before due date at a discount, the amount of the discount is no doubt often calculated by reference to the amount of interest which the payer calculates his money would have earned if he had deferred payment to the due date. But that does not mean that discount is the same as interest. Interest postulates the making of a loan and then it runs from day to day until repayment of the loan, its total depending on the length of the loan. Discount is a deduction from the price fixed once and for all at the time of payment. It appears to their Lordships to be very improbable that if the plaintiff was truly a money-lender and there were truly loans for which the post-dated cheques

were only a form of security, he would have been content that the rate of discount which he considered remunerative should apply only until maturity of the cheques (never in any of the 16 cases longer than a month) and thereafter, if the security proved valueless, to take until repayment only such rate of interest as the court awarded.

Accordingly, the defendants having failed to prove that in any of these transactions there was a contract for the repayment of money lent, there is no defence to the claim and on this ground the judgment of Ong J., should be restored. The Board have not, however, arrived at their conclusion in the same way as Ong J. arrived at his. As their Lordships have said the defence pleaded raised two questions. The first is the one that their Lordships have just determined that there was no "money lent"; and the second, which would arise only if the first had been determined otherwise, whether the plaintiff was a money-lender within the meaning of the Ordinance. But in the courts below the Judges appear to have thought that in every case there was a contract for the repayment of money lent and that the real question to be decided was whether the plaintiff was a money-lender. The notes of the argument at the trial show that Dr. Teh for the plaintiff took the point about "money lent" clearly in his closing speech. His submission reads:— "What is a money-lending transaction? As regards D.3 to D.11 defendants came to ask for out-station cheques of plaintiff to whom defendants gave own cheques in exchange. Defendants could use those cheques by special arrangement with bank. Submit that is not money-lending." Nevertheless, the trial judge in his judgment said:— "There is only one question in issue between the parties whether or not the plaintiff was a "money-lender" within the meaning of the Moneylenders Ordinance, 1951." The Court of Appeal likewise dealt only with this question; and in dealing with it concerned themselves very closely with the true meaning and effect of section 3 of the Ordinance. This section is not in their Lordships' opinion in the circumstances of this case of great significance, but in view of the different approach by the Judges in the Federation of Malaya, they think it desirable to make some comment on it.

Section 3 provides that "any person who lends a sum of money in consideration of a larger sum being repaid shall be presumed until the contrary be proved to be a money-lender." The effect of this section has been considered by Thomson J. (as he then was) in *Sadhu Singh* v. *Sellathurai*[2] in a judgment which their Lordships respectfully approve and adopt. To lend money is not the same thing as to carry on the business of money-lending. In order to prove that a man is a money-lender within the meaning of the Ordinance, it is necessary to show some degree of system and continuity in his money-lending transactions. If he were left to discharge this burden without the aid of any presumption, a defendant might frequently be in a difficulty. He might have had only one or two transactions with the money-lender and he might find it difficult to obtain evidence about the business done by the money-lender with other parties. Section 3 enables a defendant to found his claim on proof of a single loan made to him at interest, it being presumed, in the absence of rebutting evidence, that there were sufficient other transactions of a similar sort to amount to a carrying on of business.

This presumption is of little value to the defendants in this case. If they can prove that any one of these transactions was a loan at interest, they can prove a large number of similar transactions; and there is indeed no doubt that there was a course of business of the same sort between the parties going back to 1954 and other evidence of similar transactions with other persons — ample evidence to show without recourse to the presumption that the plaintiff was a money-lender within the Ordinance. However, both the courts below dealt with the case by considering whether under section 3 the burden of proof had shifted. Ong J. held that before it shifted the defendants must prove that interest was collected from them by the plaintiff, which they had failed to do; the Court of Appeal appear to have thought that the burden of proof shifted because the defendants had given *prima facie* evidence of payment of interest and that, as the plaintiff's answer to that was rejected, his case failed. Mr. Gratiaen submitted that the reasoning in the Court of Appeal was wrong; and since their Lordships have heard argument upon the point, they think it right to express their conclusion on it.

It appears to their Lordships that if a defendant gives evidence that the plaintiff lent a sum of money at interest, that may be *prima facie* evidence — such as to make it necessary or desirable for the plaintiff to call evidence in answer to it — but it does not put any legal burden on to the plaintiff unless the evidence is accepted. If, at the end of the day, after hearing all the evidence on both sides. the Judge does not accept it, that is to say, if he refuses to find that the plaintiff lent a sum of money at interest, then there is no presumption under section 3 that the plaintiff is a money-lender: for the simple reason that the defendant has failed to *establish* that fact which he must *establish* if he relies on section 3, namely, that the plaintiff lent a sum of money in consideration of a larger sum being repaid. But if at the end of the day the Judge holds that that fact has been established, that is, that the plaintiff did lend a sum of money at interest, then there is a compelling presumption that the plaintiff is a money-lender and the Judge must hold him to be so unless on the rest of the evidence in the case the plaintiff has established that he is not a money-lender.

Their Lordships have only made these observations in case they may be of help in the

future: but it is sufficient for the decision of this case that in their opinion the cheques in this case were not given for the "repayment of money lent" but rather for the purchase or discounting of other cheques. The Moneylenders Ordinance affords therefore no defence to them and the plaintiff is entitled to judgment.

Their Lordships will accordingly report to the Head of the Federation of Malaya that in their opinion this appeal should be allowed, the judgment of the Court of Appeal set aside and the judgment of Ong J. for the plaintiff restored and that the costs of the Appeal in the Court of Appeal and of this appeal should be paid by the respondents.

Appeal allowed.

Solicitors: *Lawrence, Mener & Co.; T. L. Wilson & Co.*

JAG SINGH (an Infant) v. TOONG FONG OMNIBUS CO., LTD.

[O.C.J. (Suffian J.) December 6, 1961]

[K.L. — Civil Suit No. 60 of 1961]

Damages — Running down — Duty of care of motor vehicle drivers — Highway Code and section 59(4), Road Traffic Ordinance, 1958 — Contributory negligence — Can infant be guilty of — Assessment of general damages — Application of English cases.

The plaintiff, an infant of seven years, was run over by a bus driven by the defendants' driver whilst he was in the act of trying to board the bus at a bus stop and sustained injuries calling for amputation to his right leg above the knee. In an action for negligence, the bus company denied negligence. Alternatively, it was claimed that if they were negligent, the plaintiff was guilty of contributory negligence. It was not disputed that the defendants' driver owed a duty of care to the plaintiff but it was argued that he was not guilty of a breach of this duty.

Held: (1) the standard of care prescribed by law on the basis of English authorities, was that laid down by section 25 of the Highway Code. Section 59(4) of the Road Traffic Ordinance, 1958 permitted evidence to be given by a party in civil or criminal proceedings of the failure on the part of the other party to observe any provisions of the Highway Code. Plaintiff could therefore rely on such evidence to establish liability and, on this test, liability for negligence by the defendants' driver had been established;

(2) in a question of contributory negligence the existence of such negligence does not depend on any duty owed by the injured party to the party sued. All that is required to be proved is that the injured party did not in his own interest take reasonable care of himself and contributed, by his want of care, to his own injury. Test laid down by Lord Simon in *Nance* v. *British Columbia Electric Railway* (4) approved and applied;

(3) the test of what is contributory negligence is the same in the case of a child as of an adult, modified only to the extent that the degree of care to be expected must be proportionate to the age of the child;

(4) as to general damages, awards made by English Courts should not be slavishly followed in Malaya. *Pahang Lin Siong Motor Co. Ltd.* v. *Cheong Swee Khai & Anor.* (6).

Cases referred to:—

(1) *London Passenger Transport Board* v. *Upson* [1949] 1 All E.R. 60.

(2) *Fardon* v. *Harcourt-Rivington* (1932) 48 T.L.R. 215.

(3) *Daly* v. *Liverpool Corporation* [1939] 2 All E.R. 142.

(4) *Nance* v. *British Columbia Electric Railway* [1951] A.C. 601.

(5) *Phillips* v. *L. & S.W. Ry.* 1879, 4 Q.B.D. 406.

(6) *Pahang Lin Siong Motor Co. Ltd. & Anor.* v. *Cheong Swee Khai & Anor.*, [1962] M.L.J. 29.

ACTION.

Denis Murphy (*Tara Singh* with him) for the plaintiff.

M. Edgar for the defendant.

Cur. Adv. Vult.

Suffian J.: This is an action for negligence brought against a bus company by an infant suing by his father and next friend. On the 13th day of November, 1959, the plaintiff was standing on the roadway at or near the bus stop at Pudu Road near the junction of Pudu Road and Sultan Street in Kuala Lumpur when (it was claimed) he was negligently knocked down and injured by motor bus No. BA 4383 which was being driven along Pudu Road in the direction of Sultan Street by a bus driver employed by the company. The bus ran over the plaintiff's right leg which had to be amputated above the knee. The company denied negligence and claimed alternatively that if they had been negligent the plaintiff was guilty of contributory negligence.

It is not disputed that the defendant's driver owed a duty of care to the plaintiff, but the question is, was he guilty of a breach of this duty to take care by failing to attain the standard of care prescribed by law?

What is the standard of care prescribed by law? In *London Passenger Transport Board* v. *Upson*,(1) Lord Uthwatt said at p. 70:—

> "A driver is not, of course, bound to anticipate folly in all its forms, but he is not, in my opinion, entitled to put out of consideration the teachings of experience as to the form these follies commonly take".

Lord Du Parcq expressed the same opinion in these words (at page 72):—

> "A prudent man will guard against the possible negligence of others, when experience shows such negligence to be common . . . A driver is never entitled to assume that people will not do what his experience and common sense teach him that they are, in fact, likely to do".

Viscount Dunedin in *Fardon* v. *Harcourt-Rivington*(2) said at p. 216:

> "If the possibility of the danger emerging is reasonably apparent, then to take no precautions is negligence; but if the possibility of danger emerging is only a mere possibility which would never occur to the mind of a reasonable man, then there is no negligence in not having taken extraordinary precautions".

Stable J. in *Daly* v. *Liverpool Corporation*,(3) stated at page 144:

> "My view is that the sooner it is recognised as being the law that a person who drives a motor vehicle under modern conditions is in precisely the same position as,